IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant,

vs.

JOHN W. HERRON,
Appellee.

No. 272.

Appeal from the Court of Claims.

Appellee's Brief of Argument.

Appellant's statement is not objected to, but the facts are more fully set forth in the Findings of Fact. (Trans. 3, 4, 5.) No opinion is filed in the case.

Appellee did not appeal from the judgment of the Court below, for the reason that owing to the amount claimed in his petition he was not within the statutory requirement.

It is submitted that where an appeal has been taken to the full amount of the judgment by either party the correctness of the whole judgment is at

issue. This is certainly equitable, where the Government alone has the right of an appeal. An appeal is allowed to the Government because, although but a small amount may be at issue in a special case a class of cases may be involved. This case was referred to the Court of Claims at the instance of the Comptroller of the Treasury for the reason that a class of cases was dependent upon the legal determination of the questions. It would appear but just to the Government as well as to the claimant, that all questions involved should be reviewed by this Court.

Two classes of cases are involved in this suit.

(1). *Services before the Circuit Court of Appeals.*

Appeals in two *habeas corpus* cases were taken in behalf of the United States, by direction of the Attorney-General from the Circuit Court for the Southern district of Ohio (of which Court Appellee was district attorney) to the Circuit Court of Appeals at Louisville, Kentucky.

It is contended by Appellee in *Garter's case*, submitted herewith and to which reference is made, that the judicial district of the Circuit Court of Appeals is separate and distinct from that of the district Court, although the geographical limits of one may be included within the other.

It is admitted by the Appellant that the services of Appellee were those of a special attorney rendered outside of the district of which he was district attorney.

It is further admitted that the services were not germane to his office as District-Attorney for the Southern district of Ohio.

It is also admitted that it was no part of Appellee's duties as district attorney to follow the cases to the Circuit Court of Appeals.

We respectfully differ from the Court below in their conclusion that the compensation is subject to adjustment in the Treasury Department as to his maximum compensation.

We agree with Appellant that the service was an independent employment and was that of a special attorney.

The service, not being germane to his duties as district attorney, should not be included in his maximum account.

The fees included in a district attorney's account are the fees which he received as district attorney. Fees to which he is entitled in an employment independent of his duties as district attorney have no place in his account as district attorney.

If this Court should determine that it is the duty of a district attorney to follow cases from his own district into the district of the Circuit Court of Appeals beyond the geographical limits of his own district, which we respectfully claim is not the law, then Appellee, rendering a special service, would be entitled to pay in an amount approved by the Attorney-General, which amount under the decision of this Court in *Smith's case* (159 U. S. R., 346) should be accounted for as district attorney.

But if, as we contend, and as admitted by Appellant, it was no part of his duty as district attorney for the Southern district of Ohio to prepare and argue a case before the Circuit Court of Appeals at Louisville, Ky., then his compensation would be

that of a special attorney, and should not be included in his maximum account.

The point made by Appellant is that Appellee was not duly appointed and commissioned under the provisions of 363, 365 and 366 R. S; that the Attorney-General did not certify that the services were actually rendered, etc., and that Appellee did not take the oath required by law.

It is submitted that the full requirements of the Statutes are complied with. District Attorneys are under the supervision and control of the Attorney-General, and in various ways are accountable to the Department of Justice. The Attorney-General can assign them duties.

Smith's case, supra. They are to that extent officers of the Department of Justice.

But if that position be waived, it cannot be disputed that Appellee was appointed to render the service, which was performed, and that the approval of his account for fees by the Attorney-General was virtually a certificate that all the requirements of law had been complied with.

Under any circumstances the requirement was simply directory. It comes within the rule, viz:

> If a statute is such that disregard of its provisions will constitute an irregularity, but one not necessarily fatal to acts done or proceedings had thereunder, it is said to be directory. *Ency. of Law* (23 Vol. pp. 155, 156); *Black's Law Dic. Torrey vs. Milbury* (21 Pickering, 64); *Cooleys Cons. Lim.*, 92.

(2) *Habeas corpus cases in Circuit Court.*

These cases were against the Warden of the Ohio

Penitentiary, a State institution. The Warden was a State, not a Federal, officer. Ordinarily the cases would have been heard in a State Court. But the prisioners were held under sentence by Federal Courts outside of the Southern District of Ohio.

The cases not arising in his district and against a State officer, it was not the duty of the district attorney to prosecute (?) the same. But they were cases in which the Attorney-General was at liberty to call upon the district attorney to defend the Warden.

The services were special. No fees for services of that character were provided for in the fee bill. The services were performed, not by virtue of his specific duties as district attorney, but by virtue of the order and direction of the Attorney-General.

The Attorney-General would have appointed any other district attorney or officer of the Department of Justice to attend to these cases.

The fees for special services were not included in fee bill, whether performed by district attorneys or by special counsel appointed by the Attorney-General are fixed by the Attorney-General. He not only approves of the service but also of the fee.

It is the Attorney-General who understands the character of the service, not the accounting officers. The duty rests on the Attorney:General to approve the service and fix the fee, not on the accounting officers. The service performed is a special serviee for which a special fee is allowable.

The Act of October 2, 1888 (25 S. L., 505, 545) since annually re-enacted, provides for fees of this character. The right to fix the fee is in the Attor-

ney-General, but he is frequently aided by the judges of the Court in which the service was rendered. In this case Judge Sage said in approving the account: "I think the charges not only reasonable but moderate."

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